

# **DRAFT**

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**  
**ENERGY DIVISION**  
**E-1 ID 1750**  
**RESOLUTION E-3814**  
**July 10, 2003**

## **R E S O L U T I O N**

Resolution E-3814. Southern California Edison Company for approval of one power purchase agreement contributing toward procurement of at least an additional one percent of the utility's annual electric sales from renewable energy resources irrespective of the utility's residual net short.

By Advice Letter 1680-E Filed on January 14, 2003.

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### **SUMMARY**

Southern California Edison Company (SCE) filed Advice Letter (AL) 1680-E on January 14, 2003 requesting Commission approval of one power purchase agreement (PPA) that would contribute toward procurement of at least an additional one percent of the utility's annual electricity sales from renewable energy resources irrespective of SCE's residual net short. SCE submits this contract for approval pursuant to Commission Decision (D.) 02-08-071. [REDACTED]

In this resolution we decline to approve the proposed PPA.

We have twice held this resolution from the agenda as we have wrestled with whether, and what degree, to disclose information submitted to us under seal. It is incumbent upon this Commission to simultaneously keep sensitive information confidential while still making plain to the public at large the bases for Commission decisions. In the final analysis, it is the Commission's responsibility to make decisions in the light of day, and we give that obligation great weight in determining whether commercial information is of such critical sensitivity as to override broader public concerns. This resolution finds that certain material filed under seal pursuant to Public Utilities (Pub. Util.) Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, should be disclosed for the reasons discussed in the body of this resolution. Accordingly, all text in this resolution, except for specific pricing information (including [REDACTED] amounts), which appears [REDACTED], or 151408

which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution. We wish to make clear that the decision we make here is based on the unique facts before us today, and we will adopt broadly applicable standards governing confidentiality elsewhere.<sup>1</sup>

In AL 1680-E, SCE requests that the Commission issue a resolution no later than February 13, 2003, approving the PPA as reasonable, and finding that:

1. The PPA and SCE's entry into the PPA are reasonable and prudent for all purposes, including, but not limited to, recovery of all payments made pursuant to the PPA in rates, subject only to review with respect to the reasonableness of SCE's administration of the PPAs;
2. SCE's Solicitation of renewable power that resulted in the PPA has been conducted reasonably;
3. Any procurement pursuant to the PPA is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE's compliance with any obligation that it may have pursuant to D. 02-08-071 and D. 02-10-062, or other applicable law, to procure an additional 1% of its annual electricity sales from renewable resources; and
4. Any procurement pursuant to the PPA is deemed part of SCE's "baseline" quantity of eligible renewable resources for purposes of Section 399.15 of the Pub. Util. Code or other applicable law.

SCE requests that AL 1680-E be effective on February 13, 2003, pursuant to the Procurement Contract Review Process set forth in Appendix B of D.02-08-071, under the shortened notice authority under Section V. B. of General Order 96-A and Section 491 of the Pub. Util. Code.

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<sup>1</sup> Specifically, in R.01-10-024 (the "Procurement Rulemaking"), and also in A.03-02-002 (Pacific Gas and Electric Company's "ERRA Mechanism Application").

AL 1680-E was submitted in compliance with Ordering Paragraphs 2, 3, 4, 5, and 6 of Decision (D.) 02-08-071, which: (1) allowed SCE to obtain California Department of Water Resources (DWR) credit support; (2) allowed SCE to use an expedited contract approval process set forth by the Commission; (3) required SCE to make advice letter filings for contract pre-approval within 30 days of contract signing or selection; (4) stated that the aforementioned requirements also apply to renewable and Qualifying Facility (QF) procurement during the transitional process; and (5) required the respondent utilities, including SCE, to "procure at least one percent of their annual electricity sales through a set-aside competitive procurement process for renewable resources [in which] utilities must solicit bids with contract terms of five, ten, and fifteen years, and enter into contracts with a mixture of lengths of not less than five years." (D. 02-08-071, Ordering Paragraph 6)

DWR credit support is not required by the counterparty to the proposed PPA.

The proposed PPA, for which SCE is seeking approval, was solicited under SCE's September 28, 2002 "Request for Proposals (RFP) from Eligible Renewable Resources (ERRs) Suppliers" (Renewables RFP). Responses to the Renewables RFP were due on October 10, 2002.

Early on, during the September and November 2002 Procurement Review Group (PRG) meetings in San Francisco, SCE's PRG expressed strong concern about the proposed PPA and was somewhat perplexed as to why SCE continued to negotiate with this counterparty.

On January 21, 2003, AL 1680-E was confidentially protested by Office of Ratepayer Advocates (ORA), the California Energy Commission (CEC), jointly protested by The Utility Reform Network (TURN) and the Natural Resources Defense Council (NRDC), and publicly protested by the California Wind Energy Association (CalWEA). On January 27, 2003, SCE submitted a response (most of which was confidential) to the protests of ORA, TURN/NRDC, CEC, and CalWEA.

The protestants expressed concern over compliance with D.02-08-071, the bid solicitation process and evaluation criteria, whether ratepayer interest is adequately served by the proposed PPA as filed, and [REDACTED].

This resolution finds that SCE's selection of the proposed PPA is not reasonable and is not consistent with D.02-08-071 or the stated terms of its Renewable RFP. SCE has not made a sufficient showing that the proposed PPA is in the ratepayers' interest, nor has SCE shown that the proposed PPA is [REDACTED]

Consequently, this resolution denies AL 1680-E without prejudice, effective today.

### **BACKGROUND**

On January 30, 2003, in response to SCE AL 1676-E, the Commission issued Resolution E-3809 which approved, in part, SCE's request to enter into certain renewable power purchase agreements. In AL 1676-E, SCE had requested authority to enter into five power purchase agreements contributing toward procurement of at least an additional one percent of its annual electricity sales from renewable energy resources. The Commission approved four of the five proposed PPAs in E-3809, which will allow SCE to exceed the goal of adding an additional one percent of renewable energy sales to its existing portfolio.

On August 22, 2002, the Commission issued D.02-08-071, which, among other things, set aside a portion of procurement to come from renewable sources. The following month, three renewable energy bills were signed into law.

- Assembly Bill (AB) 57, regarding Electric Utility Procurement Plans, was signed by the Governor on September 24, 2002 and became effective immediately. AB 57 added Section 454.5 to the PU Code, to provide guidance to the utilities and the Commission for the procurement of electricity and electricity demand reduction products. The bill requires the Commission to review and adopt a procurement plan for each utility in accordance with specific plan elements and objectives to ensure that no later than January 1, 2003, the utilities resume procurement for those needs that will no longer be met by DWR.
- Senate Bill (SB) 1078, regarding the California Renewables Portfolio Standard (RPS) Program, was signed by the Governor on September 12, 2002 and became effective January 1, 2003.

- SB 1038, regarding the Renewable Energy Program, Investment Plan and the Public Interest Energy Research (PIER) Program, was signed by the Governor on September 12, 2002 and became effective January 1, 2003.

D.02-08-071 ordered a separate renewables solicitation<sup>2</sup> by each utility for at least an additional one percent of their actual energy and capacity needs. This was roughly equivalent to the Renewables Portfolio Standard Program approach enacted in SB 1078<sup>3</sup> and reflected in AB 57. D.02-08-071 was issued in anticipation of SB 1078's passage, therefore the decision's requirements were conformed to the controlling language of the bill, even as our authority to order the solicitation derived from PU Code 701.3. D.02-08-071 set forth the requirements for this renewables solicitation at page 32:

"In particular, PU Code Section 701.3 states, in relevant part:

The Commission shall direct that a specific portion of future generating capacity needed for California be reserved or set aside for renewable resources.

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<sup>2</sup> The Commission also ordered the utilities to conduct a non-renewable, all-source (a.k.a. general) solicitation. Accordingly, SCE issued a Request for Offers (RFO) on September 18, 2002 for generation capacity, associated energy, and/or ancillary services for the period of January 1, 2003, or later, through December 31, 2007, or earlier. As a result of that RFO process, SCE filed Advice Letter 1660-E on November 5, 2002 for approval of proposed energy and capacity procurement contracts for potential award pursuant to a subsequent bid refresh process, in order to meet a portion of its 2003 through 2007 residual net short. On December 5, 2002, the Commission issued Resolution E-3802 approving AL 1660-E, as modified.

<sup>3</sup> SB 1078, chaptered on September 12, 2002, requires the Commission to establish a program whereby the utilities must purchase a specified minimum percentage of electricity generated by renewable energy resources. The utilities must increase their total procurement of eligible renewable energy resources by at least one percent per year so that twenty percent of their retail sales are procured from eligible renewable energy resources by December 31, 2017.

"AB 57 states, in relevant part:

[454.5(b)(9)(A)] The electrical corporation will, in order to fulfill its unmet resource needs and in furtherance of Section 701.3, until a 20 percent renewable resources portfolio is achieved, procure renewable energy resources with the goal of ensuring that at least an additional 1 percent per year of the electricity sold by the electrical corporation is generated from renewable energy resources...[provided sufficient funds are made available pursuant to Section 399.6, to cover the above-market costs for new renewable energy resources.]"<sup>4</sup>

D.02-08-071 set forth the Commission's expectation that utilities should take the mandates of Section 701.3 and AB 57 into consideration at Finding of Fact 22:

"22. We expect utilities to take into consideration in their resource selection the mandates of Section 701.3 and AB 57."

D.02-08-071 continued to set forth requirements for the power solicitations:

"Though AB57 ... [was] not yet law [when D.02-08-071 was issued], we see no reason to delay movement towards this renewable resource goal. Thus, during the transitional period, we require that [numbered format added]:

1. "each IOU hold a separate competitive solicitation for renewable resources in the amount of at least an additional 1 percent of their annual electricity sold beginning January 1, 2003.
2. "Utilities should solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years.... Utilities should enter into contracts with a mixture of term lengths.... We also require that any contracts for new renewables projects require that the resources come online and begin delivering electricity before the end of 2003.

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<sup>4</sup> The last part of Section 454.5(b)(9)(A) is shown here in its entirety, as taken directly from the July 3, 2002 enrolled version of AB 57. Section 454.5(b)(9)(A) remained unchanged in the chaptered version of AB 57 as signed on September 24, 2002.

3. "During the solicitation process, utilities should give a preference to existing renewable resources in the bidding process if their bids are equal to or lower than prices offered by new projects....
4. "This requirement for a 1 percent increase in renewable resources is irrespective of the residual net short, though we encourage the utilities to solicit bids from innovative renewables projects that can help meet the utilities' residual net short requirements.
5. "We also require that bids to provide renewable power clearly identify any expected funds from the public goods charge (PGC) administered by the CEC that are included in the resource pricing.

"Creating this set-aside in the transitional procurement process for renewable resources should obviate the need to require automatic extensions of renewable contracts currently held by DWR, as requested by Ridgewood Olinda LLC in its June 12 motion. Thus, we deny this motion, but encourage Ridgewood, and any other renewable operators holding existing or recently expired DWR or utility contracts, to participate in the solicitation process described above.

"In comments on this alternate decision, many parties request that the Commission set at least a provisional "benchmark" price for reasonableness review for renewable procurement. AB57 includes provision for such a benchmark, along with any "above-market" costs beyond the benchmark. As a general proposition, any renewable contract approved through the transitional procurement process outlined in this decision will be deemed reasonable, with its costs fully recoverable by the utilities. Thus, establishment of a benchmark for the transitional period is not strictly required. However, to give guidance to bidders and to the utilities, we will adopt an interim, provisional benchmark of 5.37 cents per kWh, which is consistent with prices previously adopted by the Commission in D.01-06-015, and as recommended by the California Biomass Energy Alliance (CBEA). We will revisit this benchmark in the next phase of this proceeding for the long-term procurement process. During the transitional period, any contract that meets or exceeds the benchmark will be deemed *per se* reasonable, though other contracts at prices above the benchmark may also be approved by the Commission for cost recovery through the process outlined in this decision.

"We also clarify, in response to comments from a number of parties, that this renewable procurement set-aside in the interim period is subject to the same procedural process outlined earlier in this decision, as well as the contract provisions that allow the utilities to partner with DWR.

"Finally, we encourage the utilities to work with the CEC and the CPA to take advantage of their knowledge of available existing and new renewable resources. In the next phase of this proceeding, we will make explicit requirements for the coordination of the CEC's PGC fund awards with utility renewable resource procurement, in compliance with AB57.

"The success of such an effort in the next phase, however, is largely dependent on legislative authorization of the CEC's financial plan for the future of the Renewable Energy Program. We anticipate that the legislature will have finalized the financial reauthorization of the PGC program when we turn to the full Procurement Plans in the next phase, and we will revisit the issue of establishing a benchmark price at that time." (D.02-08-071, pages 32-34)

In D.02-08-071, the Commission required each utility to establish a Procurement Review Group (PRG) whose members, subject to an appropriate non-disclosure agreement, would have the right to consult with the utilities and review the details of:

1. Each utility's overall transitional procurement strategy;
2. Proposed procurement processes including, but not limited to, RFO; and
3. Proposed procurement contracts with the utilities before any of the contracts are submitted to the Commission for expedited review.

The PRG for SCE comprises the California Energy Commission (CEC), Department of Water Resources (DWR), Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), Coalition of California Utility Employees (CUE), Natural Resources Defense Council (NRDC), and the Commission's Energy Division.

In D.02-12-074, the Commission, *inter alia*, defined exactly what would constitute an incremental one percent of renewable generation:



"To be considered incremental renewable generation, the interim procurement must result in a net increase of at least 1% of total 2001 retail sales in the utility's renewable portfolio above its 2002 level. If the 2002 renewable generation baseline amount will shrink in 2003, the utility must procure sufficient renewable power over and above this 1% of total 2001 retail sales amount, to result in a total 2003 renewable generation portfolio at least equal to the following: 2002 renewable procurement plus 1% of 2001 retail sales." (D.02-12-074, pages 18-19)

Further, D.02-12-074, which was issued in December 2002, informed SCE that while the Commission generally viewed the company's renewable "procurement targets and the RFO process" as generally reasonable up to that point, SCE's delay in filing specific contracts with the Commission was sanctionable as not in compliance with D.02-08-071:

"Edison provides in its November 12th filing a moderate amount of information regarding targets and assumptions for its 1 percent incremental renewable procurement. One of these assumptions - that the passage of SB 1078 limits the authority of § 701.3 - has been addressed above. Details regarding procurement targets and the RFO process are contained in confidential Volume II of the short-term plan, and what is disclosed looks, on balance, reasonable.

"No Advice Letter filing has been forthcoming, however, despite the utility's pledge to file early this month. This delay unfortunately lends credence to the concerns expressed by TURN and CalWEA that Edison is deliberately stalling the interim procurement process, either to test the Commission's § 701.3 authority or to pre-judge the implementation efforts for the RPS program. Examples such as creation of undue barriers to participation by particular technologies, and of price benchmarks different from the Commission's 5.37¢/kWh target, are cited in support of these assertions. Both of these practices, if verified, would constitute violation of Commission orders and would be subject to sanction. The Commission is actively exploring its options in this regard.

"Subject to further sanction would be the utility's continued failure to simply file an Advice Letter containing renewable contracts of any sort, be they for more or less than the 1 percent target. Waiting to file will not have

the effect of avoiding the requirements of D.02-08-071; in fact it will make those requirements more challenging, as the utility will need to procure the same GWh amount over fewer days in the calendar year.

"We find that the utility is in noncompliance with D.02-08-071, and will address this noncompliance in a subsequent Commission order. In the event that this Advice Letter is forthcoming, we reiterate our direction provided to the other utilities regarding calculation of the 1 percent target and the preservation of Edison's baseline level of renewable generation."  
(D.02-12-074, pages 25-26)

### **NOTICE**

Notice of Advice Letter 1680-E was made by publication in the Commission's Daily Calendar. SCE states that a copy of the Advice Letter was mailed and distributed in accordance with Section III-G of General Order 96-A.

### **PROTESTS**

D. 02-08-071 adopted an expedited schedule that requires a significantly reduced protest period. Protests were due within seven days of the advice letter filing and replies to protests were due within three days of the protest.

SCE's Advice Letter 1680-E was timely and confidentially protested on January 21, 2003 by ORA, TURN/NRDC, and the CEC, and publicly protested by CalWEA.

SCE submitted a confidential response to the protests of ORA, TURN/NRDC, and the CEC on January 27, 2003, under Pub. Util. Code Section 583. On January 27, 2003, SCE submitted a response (most of which was confidential) to the protests of ORA, TURN/NRDC, CEC, and CalWEA.

The protestants expressed concern over compliance with D.02-08-071, the bid solicitation process and evaluation criteria, whether ratepayer interest is adequately served by the proposed PPA as filed, and whether the proposed [REDACTED]

## **DISCUSSION**

D.02-08-071 adopted a process to review and approve transitional period procurement contracts. It provided the utilities with an opportunity for an expedited resolution that resolves reasonableness issues, while ensuring effective Commission oversight, and a provisional benchmark of 5.37 cents per kWh was set forth in order to gauge the reasonableness of all contracts for which utilities seek approval. The utilities had the burden to show that the evaluation criteria used in the process were reasonable.

We examine SCE's request based on the directives set forth in D.02-08-071, as clarified in D.02-12-074, and generally with regard to the bid solicitation process and evaluation criteria, level of ratepayer benefit, [REDACTED], and the degree of PRG involvement.

### **Bid Solicitation Process**

Per D.02-08-071, SCE was required to "hold a separate competitive solicitation for renewable resources in the amount of at least an additional 1 percent of their annual electricity sold beginning January 1, 2003." The proposed PPA for which SCE is now seeking approval was solicited under SCE's Renewables RFP. Prior to the issuance of the Renewables RFP, SCE circulated a notice of availability via electronic mail and facsimile to prospective participants<sup>5</sup> inviting them to submit a Proposal Request Form. Responses to the Renewables RFP were due on October 10, 2002.

In contrast to SCE's September 18, 2002 General (all-source) RFO for generation capacity, energy, and related products, SCE did not post the September 28, 2002 Renewables RFP on its website. SCE did not state why the Renewables RFP was not posted on its website, but SCE did post "Responses to Request for Proposal Inquiries" on its website and stated that "SCE is posting the frequently asked questions (FAQs) and responses ... as a means of providing those who have

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<sup>5</sup> [REDACTED])

presented [renewable] proposals with equal access to information."<sup>6</sup> SCE also posted a revised definition of eligible renewable resources (ERRs) on this same webpage.<sup>7</sup>

**Bid Evaluation Criteria**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]" (TURN/NRDC Protest, page 4)

[REDACTED]

[REDACTED](TURN/NRDC Protest, page 5)

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>6</sup> SCE Renewables FAQs:

[http://www.sce.com/sc3/005\\_regul\\_info/005i\\_qualifying\\_facilities/RFP\\_QandA.htm](http://www.sce.com/sc3/005_regul_info/005i_qualifying_facilities/RFP_QandA.htm)

<sup>7</sup> SCE's revised definition of eligible renewable resources (ERRs) in its RFP:

[http://www.sce.com/NR/rdonlyres/eujv6pasxnth4vy6uau4mieceu5fmn2df6hsr4legvw32yjuxqy47q422oidkaxujcfc3ulkl6c7qdv2qxc3e4zj7cd/QF\\_Protocol\\_Upd\\_20021001.pdf](http://www.sce.com/NR/rdonlyres/eujv6pasxnth4vy6uau4mieceu5fmn2df6hsr4legvw32yjuxqy47q422oidkaxujcfc3ulkl6c7qdv2qxc3e4zj7cd/QF_Protocol_Upd_20021001.pdf)

### **Electricity Delivery in 2003**

D.02-08-071 required SCE to "solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years." SCE set forth this requirement in Section V.(C)(2) of its Renewables RFP:

[REDACTED]

SCE further qualified these terms in Renewables RFP "Section V.(C)(4) Levelized Energy Price (Minimum 5 Year Duration)" which includes the following:

[REDACTED]

[REDACTED]

D.02-08-071 also required that "any contracts for new renewables projects ... come online and begin delivering electricity before the end of 2003."

[REDACTED]

### **Preference for Existing Renewable Resources**

D.02-08-071 required SCE to give "preference to existing renewable resources in the bidding process if their bids are equal to or lower than prices offered by new projects."<sup>8</sup> [REDACTED]

### **Compliance with the One Percent Requirement**

D.02-08-071 stated that the "requirement for a 1 percent increase in renewable resources is irrespective of the residual net short, though we encourage the utilities to solicit bids from innovative renewables projects that can help meet the

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<sup>8</sup> SCE's RFO contained a similar statement noting SCE's preference for existing projects, see Section III. B., Page 5 of SCE RFP Protocols.

utilities' residual net short requirements." The Commission has recently assigned a significant number of DWR contracts to SCE which created the concept of a utility's residual net short.<sup>9</sup> The four renewable PPAs approved by the Commission in E-3809 on January 30, 2003 already exceed the one percent goal, [REDACTED].

### **Transitional Procurement and Baseline Confirmation Issues**

In AL 1680-E, SCE requested the following two findings:

"Any procurement pursuant to the PPA is deemed transitional procurement by SCE from a renewable resource for purposes of determining SCE's compliance with any obligation that it may have pursuant to D. 02-08-071 and D. 02-10-062, or other applicable law, to procure an additional 1% of its annual electricity sales from renewable resources; and" (SCE AL 1680-E, page 3)

"Any procurement pursuant to the PPA is deemed part of SCE's "baseline" quantity of eligible renewable resources for purposes of Section 399.15 of the Public Utilities Code or other applicable law." (SCE AL 1680-E, page 3)

Since we decline to approve the proposed PPA, these requested findings will not be made.

### **Public Goods Charge (PGC) Funding [REDACTED]**

D.02-08-071 required "that bids to provide renewable power clearly identify any expected funds from the public goods charge (PGC) administered by the CEC that are included in the resource pricing." [REDACTED].

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<sup>9</sup> The allocation of DWR contracts to SCE, and other IOUs, spawned the term "residual net short," which refers to a utility's open position relative to its system load. An IOU's "net short" is simply its System Load, less its Utility Retained Generation (URG). Residual net short is System Load, less URG, less allocated DWR contracts.

The other two utilities (Pacific Gas & Electric and San Diego Gas & Electric) did not utilize such contract clauses. This contract language was not set forth in the Renewables RFP, nor was it part of the standard contract boilerplate. It appears that this language was formulated during contract negotiations. The use of such clauses was not envisioned by this Commission. As we did in E-3809, we again conclude that the use of these contract [REDACTED] clauses are not consistent with the D.02-08-071 requirement that "utilities ... solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years" for the reason that the use of such clauses could result in contracts shorter than five years which is inconsistent with our directives on this point.

### **Reasonableness Benchmark and PGC Funding [REDACTED]**

In D.02-08-071, we set forth a provisional benchmark of 5.37cents/kWh in an attempt to establish an acceptable level for *per se* reasonableness. However, the ORA protest to the previous advice letter filing (AL 1676-E) correctly noted that, "D.02-08-071 did not specify whether the benchmark price was in nominal or constant dollars" (ORA Protest to SCE AL 1676-E, page 2). Notwithstanding that point, w[REDACTED]

SCE contends that the proposed PPA is [REDACTED] which is disputed by both TURN/NRDC and the CEC. The latter issue is discussed earlier in this resolution

[REDACTED]

[REDACTED]

It should be noted that we do not establish a contract approval standard in this Resolution, thus the Commission's denial of the proposed PPA is not necessarily indicative of future dispositions.

### **Sanctions Issue**

TURN and the CEC renewed their requests that the Commission find SCE in contempt of D.02-08-071 and D.02-10-062 pursuant to Section 2113 of the PU Code. Resolution E-3809 addressed this issue in some detail, and we continue to

defer consideration of sanctions for SCE's non-compliance with the above referenced decisions.

### **Procurement Review Group (PRG) Involvement**

D.02-08-071 required SCE, PG&E, and SDG&E to establish a Procurement Review Group (PRG) in order to ensure that interim procurement contracts entered into by the utilities are subject to sufficient and expedited review and pre-approval. The PUC Energy Division and ORA staff would be ex officio members of each PRG, and membership of the PRG would be open to an appropriate number of interested parties who are not "market participants."

PRG members have the right to consult with and review the details of: (1) each utility's overall interim procurement strategy; (2) proposed procurement contracts with the utilities before any of the contracts are submitted to the PUC for expedited review; and (3) proposed procurement processes including but not limited to RFPs, which result in contracts being entered into in compliance with the terms of the RFP.

From September 2002 through December 2002, SCE sponsored two face-to-face PRG meetings<sup>10</sup> in San Francisco and arranged three telephone conferences<sup>11</sup> concerning SCE's renewable solicitation. In a meeting on September 16, SCE reviewed its draft RFO documents with its PRG. SCE received feedback on the draft documents during a September 19 conference call, and took it into account before finalizing and issuing the RFO to potential renewable bidders on September 28. At this meeting, the PRG concurred that SCE should accept bids from projects with on-line dates after December 31, 2003, but that SCE should prefer those resources, if possible, that came on-line as soon as possible. SCE concurrently provided a copy of the final Renewables RFP to each of its PRG members. At the November 8 PRG meeting, SCE reviewed the status of its

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<sup>10</sup> These meetings took place at the Hyatt Regency Hotel in San Francisco on September 16 and November 8, 2002.

<sup>11</sup> The phone conferences were held on September 19, November 14, and December 4, 2002.



solicitation by providing preliminary results and substantial detail regarding the progress of negotiations with “short listed” bidders.

During the November 14 PRG conference call, SCE again discussed the progress of the negotiating and contracting process. On December 4, SCE provided the PRG with near-final versions of “term sheets” that provided substantial detail regarding proposed contract terms with the bidders who were being selected from SCE’s “short list.” During a PRG conference call that same day, SCE reviewed the term sheets and SCE’s intent to file shortly an advice letter requesting Commission approval of finalized contracts based on the material terms reflected in the term sheets.

ORA, TURN, CEC, NRDC, DWR, CUE, and the Commission's Energy Division actively participated in this PRG process.

## **COMMENTS**

PU Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. This draft resolution will be circulated for a third time, for a one-week comment period from Monday, March 3, 2003, to 12 PM noon on Monday, March 10, 2003. The first comment period on the draft resolution was from approximately 10:40 AM on Friday, February 7, 2003 to 3:00 PM<sup>12</sup> on Monday, February 10, 2003. The second comment period was from approximately 4:00 PM on Friday, February 21, 2003 to 3:00 PM on Monday, February 24, 2003.

Energy Division requests that the 30-day comment period for this resolution be reduced to two three-day comment periods and one seven-day comment period for several reasons: (1) the provision of the expedited schedule set forth in D.02-08-071; (2) the PRG's active participation throughout the interim procurement process leading up to the advice letter and resolution; (3) the ability of parties to provide meaningful comments during the reduced comment periods; and (4) the

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<sup>12</sup> In the first comment period, comments on the draft resolution were originally due on Monday February 10, 2003 at 9:00 AM, but the time was later extended to 3:00 PM.

Commission's ability to incorporate comments received into the resolution to the extent appropriate.

### **First Comment Period on the Draft Resolution**

On Friday, February 7, 2003 at about 10:40 AM, a draft of this resolution was circulated exclusively to the PRG by the Energy Division via email for a confidential comment period of three calendar days. Comments were due via email to the Energy Division by 3:00 PM on Monday February 10, 2003. The draft resolution that was circulated contained confidential material protected by the Non-Disclosure Agreement for SCE's PRG, and by Section 583 of the Pub. Util. Code.

As a result of the first three-day comment period on the draft resolution, comments were received from TURN/NRDC, CEC, ORA, and SCE. Parties had been directed to submit redline versions of the draft resolution, with the option of submitting additional comments in another format of their choice. In support of the draft resolution, TURN/NRDC and the CEC submitted redline versions of the draft resolution, while ORA simply submitted an email which read, "ORA supports the Resolution as it stands." However, in opposition to the draft resolution, SCE did not submit a redline version of the draft resolution, stating that the draft would have to be "substantially redone" to adequately reflect SCE's position.

In its comments, the CEC "commends the California Public Utilities Commission in its Draft Resolution and provides brief comments" in the redlined attachment. TURN/NRDC, in support of the draft resolution, stated:

"TURN and NRDC strongly support both the text and findings in the draft resolution. [REDACTED] The draft resolution properly acknowledges these concerns and reaches findings that are generally reasonable."  
(TURN/NRDC Cover Letter to Comments on the Draft Resolution, page 1)

In its comments in opposition to the draft resolution, SCE stated:

"[REDACTED] (SCE Comments on the Draft Resolution, page, 2)

On February 11, 2003, SCE submitted additional comments addressing the draft resolution's finding related to the public release of certain information which was filed confidentially under Pub. Util. Code Section 583 and the terms of the May 1, 2002 Protective Order issued in Rulemaking (R.) 01-10-024. In its February 11, 2003 comments, SCE stated that it "opposes the public release of confidential information."

### **Second Comment Period on the Revised Draft Resolution**

At Energy Division's request, the Commission held this Resolution from its agenda. Energy Division sought additional time to address the confidentiality issues that the parties had raised.

In response to the first comment period, the draft resolution was revised to[REDACTED] On February 21, 2003, Energy Division circulated to SCE and the PRG members a revised draft resolution for a second confidential comment period of three calendar days. In response to this February 21, 2003 draft, TURN/NRDC and the CEC provided comments [REDACTED]

### **Third Comment Period on the Draft Resolution**

On Monday, March 3, 2003, shortly before 3 PM, Energy Division circulated for a third round of comments a further revised draft resolution. The draft that was circulated, in contrast to the prior version, opted to disclose confidential material. Comments were due to be received by the Energy Division by 12 PM noon on Monday, March 10, 2003. No provision was made for reply comments.

Energy Division received timely comments from TURN/NRDC and from the CEC. Both of these sets of comments supported the draft resolution. Energy Division received untimely comments from ORA that also supported the draft resolution. Finally, Energy Division received untimely comments from SCE opposing the Draft Resolution. Because the untimely comments were only a few hours late, and because they help us in understanding the issues, we will consider them alongside the timely comments.

## **Discussion Regarding Parties' Comments**

SCE is the sole proponent of keeping the redacted material confidential, and so we devote the bulk of our discussion of confidentiality to addressing SCE's concerns. We quote at length from SCE's first set of comments regarding confidentiality, and address SCE's comments in some detail. As we noted at the outset of this resolution, the government of this state is generally supposed to be conducted in the sunshine. There are, of course, exceptions to this general rule, and so we face a balance between keeping confidential that which, if released, would harm ratepayers, while making clear to the public at large what we are doing, and why we are doing it. With that backdrop, we turn to the questions at hand: whether to release redacted information to the public, and, if so, what redacted information to make public.

SCE points out, correctly, that:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]

[REDACTED] [REDACTED] . . . assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission." (*Re Southern California Edison Company (Edison)* [Decision (D.) 91-12-019] (1991) 42 Cal.P.U.C.2d 298, 300.) Section 583 neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential. (*Id.*, 42 Cal.P.U.C.2d at 301.) As we noted in *Edison*, supra:

The Commission has broad discretion under Section 583 to disclose information. See, for instance, *Southern California Edison Company v. Westinghouse Electric Company*, 892 F.2d 778 (1989) in which the United States Court of Appeals for the Ninth District stated (at p. 783):

On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the

statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted.<sup>13</sup>

In Resolution L-290, we go on to explain that:

The legal test for state agency disclosure of public records is set forth in the California Public Records Act (PRA) (Government Code Section 6250 et seq.). The PRA is intended to provide "access to information concerning the conduct of the people's business," while being "mindful of the rights of individuals to privacy." (Government Code Section 6250.) PRA exemptions of certain classes of records from public disclosure must be narrowly construed to ensure maximum disclosure of government operations. (*New York Times v. Superior Court* (1990) 218 Cal.App.3d 1579, 1585.) The PRA requires that the public be given access to government records unless they are specifically exempt from disclosure, or the public interest in nondisclosure clearly outweighs the public interest in disclosure. (Government Code Section 6255.) The listing of a record among the specific exemptions in the PRA does not prohibit the release of the records. We have long recognized that PRA exemptions are permissive, not mandatory; "they permit nondisclosure but do not prohibit disclosure." (*Re San Diego Gas & Electric Company (SDG&E)* (1993) 49 Cal.P.U.C.2d 241, 242, citing *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 655.) The general policy of the PRA clearly favors disclosure. Unless there is a showing that the public interest in confidentiality clearly outweighs the public interest in disclosure, we will generally release records upon request.<sup>14</sup>

[REDACTED]

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<sup>13</sup> Resolution No. L-290, California Public Utilities Commission, 2000 Cal. PUC LEXIS 1087, June 22, 2000.

<sup>14</sup> Resolution L-290, above.

**[REDACTED]**

[REDACTED] We are certainly cognizant of the impossibility of “unringing the bell” and making again confidential that which has been publicly disclosed. Nonetheless, we feel that it is sufficiently clear that it is in the public interest to release the information disclosed by this resolution [REDACTED].

**Conclusions on Disclosure Issues**

Therefore, this resolution finds that certain material filed under seal pursuant to Pub. Util. Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, will be made public. Specifically, we opt to make public some information as shown here:

1. Discussion of [REDACTED] issues, except that proposed [REDACTED] pricing information will remain under seal.
2. Proposed Contract terms (e.g., name of counterparty, pricing, duration, volumes). The pricing information will remain under seal.
3. The relative merits of the proposed contract vis. competing offers can be disclosed as discussed herein.
4. RFP terms will be disclosed.

Accordingly, all text in this resolution, except for specific pricing information (including [REDACTED] amounts), which appears [REDACTED], or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution.

[REDACTED]

**Conclusions Regarding the Shortening of the Comment Periods**

In addition, Decision 99-11-052 discussed the need to reduce or waive the comment period due to public necessity. Rule 77.7(f)(9) requires this Commission to engage in a weighing of interests and refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment.

We have balanced the public interest in avoiding the possible harm to public welfare flowing from delay in considering the Resolution against the public interest in having the full 30-day period, or even a reduced period, for review and comment, and have concluded that the former outweighs the latter. Failure to adopt this resolution before the expiration of the 30-day review and comment period would cause significant harm to the public welfare. Public necessity requires the waiver of the 30-day comment period in order to secure the potential benefits of the proposed interim procurement contracts to SCE customers. Thus, the 30-day comment period was reduced to two three-day comment periods and one seven-day comment period due to public necessity.

## **FINDINGS**

1. D.02-08-071 directed SCE, PG&E, and SDG&E to file an Advice Letter to seek pre-approval of any contract for transitional procurement, including contracts with renewables energy resources.
2. DWR credit support is not required by the counterparty to the PPA proposed by SCE in AL 1680-E.
3. The PRG for SCE comprises the California Energy Commission (CEC), California Utility Employees (CUE), Department of Water Resources (DWR), Energy Division, Office of Ratepayer Advocates (ORA), Natural Resources Defense Council (NRDC), and The Utility Reform Network (TURN).
4. SCE filed AL 1680-E on January 14, 2003 requesting approval of one power purchase agreement (PPA) contributing toward procurement of at least an additional one percent of the utility's annual electricity sales from renewable energy resources irrespective of utility residual net short.
5. AL 1680-E was confidentially protested by ORA, TURN/NRDC, and the CEC, and publicly protested by CalWEA on January 21, 2003.
6. SCE submitted a confidential response to the protests of ORA, TURN/NRDC, and the CEC, and a public response to CalWEA, on January 27, 2003.
7. SCE complied with the following requirements of D.02-08-071:

- (a) "Each IOU hold a separate competitive solicitation for renewable resources in the amount of at least an additional 1 percent of their annual electricity sold beginning January 1, 2003.
  - (b) "Utilities should solicit bids for electricity to be delivered beginning January 1, 2003, and extending for five, ten, and 15 year terms, with no contract shorter than five years.
  - (c) "This requirement for a 1 percent increase in renewable resources is irrespective of the residual net short, though we encourage the utilities to solicit bids from innovative renewables projects that can help meet the utilities' residual net short requirements.
  - (d) "We also require that bids to provide renewable power clearly identify any expected funds from the public goods charge (PGC) administered by the CEC that are included in the resource pricing.
8. For purposes of accessing the proposed PPA, SCE has not sufficiently complied with the following requirements of D.02-08-071:
- (a) "Utilities should enter into contracts with a mixture of term lengths [equal to or between 5 and 15 years in duration].
  - (b) "During the solicitation process, utilities should give a preference to existing renewable resources in the bidding process if their bids are equal to or lower than prices offered by new projects.
  - (c) "We also require that any contracts for new renewables projects require that the resources come online and begin delivering electricity before the end of 2003.
  - (d) "During the transitional period, any contract that meets or exceeds the 5.37 cents per kWh benchmark will be deemed per se reasonable, though other contracts at prices above the benchmark may also be approved by the Commission for cost recovery through the process outlined in this decision."
9. As proposed, contract [REDACTED] clauses tied to [REDACTED] could result in a contract term shorter than five years, which is inconsistent with our directives on this point.
10. [REDACTED]
11. In E-3809 (Finding 10), we found that "SCE's solicitation of renewable power ... has been conducted reasonably for purposes of this interim procurement,



although we order several changes ...." Our denial here of the proposed [REDACTED] contract serves to further reinforce the reasonableness of this solicitation process.

12. [REDACTED]
13. [REDACTED]
14. We do not establish a contract approval standard in this Resolution, thus the Commission's denial of the proposed PPA is not necessarily indicative of future dispositions.
15. This resolution finds that certain material filed under seal pursuant to Pub. Util. Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, should remain confidential. Accordingly, all text in this resolution, except for specific pricing information (including [REDACTED] amounts), which appears [REDACTED], or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution.
16. The proposed PPA is not reasonable and should not be approved.
17. We should deny AL 1680-E without prejudice, effective today.

**THEREFORE IT IS ORDERED THAT:**

1. SCE's request to enter into the proposed power purchase agreement contributing toward procurement of at least an additional one percent of its annual electricity sales from renewable energy resources, in Advice Letter 1680-E, is denied without prejudice.
2. All text in this resolution, except for specific pricing information (including [REDACTED] amounts), which appears [REDACTED], or which is marked "[REDACTED]" in the redacted copy, should be made public upon Commission approval of this resolution.
3. This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on July 10, 2003; the following Commissioners voting favorably thereon:

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WILLIAM R. AHERN  
Executive Director